

## CCRB INVESTIGATIVE RECOMMENDATION

Investigator: Samuel Bufter	Team: Team # 1	CCRB Case #: 200902534	<input checked="" type="checkbox"/> Force	<input type="checkbox"/> Discourt.	<input type="checkbox"/> U.S.
			<input checked="" type="checkbox"/> Abuse	<input type="checkbox"/> O.L.	<input type="checkbox"/> Injury
Incident Date(s) Wednesday, 02/18/2009 11:30 PM	Location of Incident: Outside 725 East Gun Hill Rd. (near the corner of White Plains Rd.)	Precinct: 47	18 Mo. SOL 8/18/2010	EO SOL 8/18/2010	
Date/Time CV Reported Thu, 02/19/2009 11:17 AM	CV Reported At: CCRB	How CV Reported: In-person	Date/Time Received at CCRB Thu, 02/19/2009 11:17 AM		

Complainant/Victim	Type	Home Address

Subject Officer(s)	Shield	TaxID	Command
1. POM Victor Reyes	02151	947510	47th Precinct
2. POM Elvis Cole	09585	947728	47th Precinct
3. POM Joseph Deck	08350	947736	47th Precinct

Officer(s)	Allegation	Investigator Recommendation
A.POM Victor Reyes	Abuse: PO Victor Reyes stopped § 87(2)(b)	
B.POM Elvis Cole	Abuse: PO Elvis Cole stopped § 87(2)(b)	
C.POM Joseph Deck	Abuse: PO Joseph Deck stopped § 87(2)(b)	
D.POM Elvis Cole	Abuse: PO Elvis Cole drew his gun.	
E.POM Victor Reyes	Abuse: PO Victor Reyes threatened to arrest § 87(2)(b)	
F.POM Victor Reyes	Abuse: PO Victor Reyes frisked § 87(2)(b)	
G.POM Victor Reyes	Abuse: PO Victor Reyes searched § 87(2)(b)	
H.POM Victor Reyes	Force: PO Victor Reyes used physical force against § 87(2)(b)	

### Synopsis

§ 87(2)(b) filed a walk-in complaint with the Civilian Complaint Review Board on February 19, 2009. On February 18, 2009, § 87(2)(b) left his mother's apartment and was walking on East Gun Hill Road towards White Plains Road in the Bronx. Three officers, PO Victor Reyes, PO Elvis Cole and PO Joseph Deck, all whom were assigned to footposts in the 47<sup>th</sup> Precinct, observed § 87(2)(b) walking in their direction. The officers asked him to stop. § 87(2)(b) passed them, but turned around when the officers again asked him to stop, and said, "What the fuck?" The officers instructed him to get his hands out of his pockets and told him to get against a wall (allegations A, B and C). § 87(2)(b) removed his hands from his pockets, but his right hand was in a cast, so he had to forcefully jerk his hand out of his pocket because the cast was initially stuck on it. After observing this jerking motion, PO Cole allegedly drew his gun (allegation D) and PO Reyes allegedly informed § 87(2)(b) that he could be arrested for making that motion (allegation E). § 87(2)(b) faced a wall while PO Reyes frisked his right jacket pocket and waistband (allegation F). § 87(2)(b) alleged that PO Reyes also reached into his pockets and hit his groin, though the officers denied that PO Reyes did this (allegations G and H). PO Reyes issued § 87(2)(b) a disorderly conduct summons for creating a hazardous or physically offensive condition, and § 87(2)(b) left.

§ 87(2)(b), § 87(2)(g)

§ 87(2)(b)

§ 87(2)(b)

§ 87(2)(b)

§ 87(2)(b)

§ 87(2)(b)

§ 87(2)(b)

§ 87(2)(b)

### Summary of Complaint

§ 87(2)(b)

§ 87(2)(b)

§ 87(2)(b)

§ 87(2)(b) §(encl. 8).

On February 18, 2009 at about 11:30 PM, § 87(2)(b) left his mother's apartment and was walking on East Gun Hill Road toward White Plains Road in the Bronx. It was raining, so § 87(2)(b) was wearing a black raincoat, a track jacket, a gray hooded sweatshirt and blue jeans. The hood of the sweatshirt was over his head and his hands were in his pockets. He was also wearing headphones and listening to music. § 87(2)(b) was directly outside a funeral home at 725 East Gun Hill Road when he saw three uniformed police officers, whom he identified from their nameplates as POs Cole, Reyes and Deck, walking in his direction. As he and the officers approached each other, he heard one of the officers say, "Yo." In response, § 87(2)(b) said, "Yo." The officer then said, "What?" and § 87(2)(b) said, "What?" § 87(2)(b) did not initially turn around because he had not done anything wrong. After § 87(2)(b) and the officers walked past each other, § 87(2)(b) heard one of the officers say, "Sir, please stop right there."

§ 87(2)(b) said, "What the fuck?" and slowly turned around. PO Cole asked § 87(2)(b) "What's the matter, bro? You didn't hear us say 'stop?'" § 87(2)(b) replied, "Of course I heard you, my headphones are not that loud." PO Reyes said, "Oh, you said fuck us?" § 87(2)(b) replied that he never said "fuck you" and that he had asked, "What the fuck?" meaning what the fuck were they stopping him for. The officers accused § 87(2)(b) of being "a smart guy" and PO Cole ordered him to take his hands out of his coat. § 87(2)(b) immediately took out his left hand, but was slower in taking out his right hand because it was in a splint and the splint became caught in the pocket. When § 87(2)(b) jerked his right hand out of his pocket, PO Cole drew his gun and pointed it at the ground in front of § 87(2)(b). PO Cole then said, "Hey bro, you know I could have shot you just now." § 87(2)(b) responded, "Why? Because my hand is broken and it's hard to get it out of my coat?" PO Cole replied that the manner in which he took his hand out of his pocket could have justified shooting him.

PO Deck told PO Cole to step back and asked § 87(2)(b) what had happened to his hand, as well as where he was coming from and where he was going. After § 87(2)(b) answered the questions, PO Cole told § 87(2)(b) that he should not speak to officers of the law that way and asked him why he was acting in a hostile manner. PO Reyes then said, “You know I could throw the cuffs on you for what you said, bro.”

One of the officers, § 87(2)(b) believed it was PO Cole, asked § 87(2)(b) for identification and he provided it. PO Cole checked § 87(2)(b) for warrants and said, “He doesn’t have anything.” PO Cole made § 87(2)(b) face a wall, and § 87(2)(b) could, therefore, not see the officers. An officer, whom § 87(2)(b) supposed was PO Cole, but who was identified by the officers’ statements as PO Reyes, frisked his sleeves, frisked the pockets of his pants, track jacket, sweatshirt and coat, then got in front of him and frisked the front of his body and his waistband and reached into his coat pockets. As PO Reyes was frisking § 87(2)(b)s lower body, he struck § 87(2)(b) in the groin with what § 87(2)(b) described as a “karate chop.” § 87(2)(b) screamed and one of PO Reyes’s partners asked, “Hey, what happened?” § 87(2)(b) replied, “He hit me in the nuts!” referring to PO Reyes. § 87(2)(b) stated that the only time he used profanity was when he said, “What the fuck?” at the outset of the stop. The officers released § 87(2)(b) after he was issued a summons for disorderly conduct.

### **Results of Investigation**

#### **Officer Statements**

*On 2-18-09, PO Elvis Cole, PO Victor Reyes and PO Joseph Deck were dressed in uniform and assigned to 47<sup>th</sup> Precinct Operation Impact foot patrol. Their tour of duty was from 5:30 PM on February 18, 2009 to 2:05 AM on February 19, 2009. On the date of occurrence, each officer had been out of the NYPD Academy for six weeks.*

#### **Police Officer Victor Reyes**

*PO Reyes is a § 87(2)(b)-old Hispanic male who stands 6’ tall and weighs approximately 200 lbs.*

PO Reyes issued **summons #** § 87(2)(b) to § 87(2)(b) for “disorderly conduct – offensive conduct” (encl. 10). He cited subsection 7 of the disorderly conduct statute, which states that a person is guilty of disorderly conduct when he creates a hazardous or physically offensive condition.

In his memo book, PO Reyes noted that § 87(2)(b) was stopped at 11:43pm because he made furtive movements, shouted “fuck you,” turned violently and yelled (encl. 9). He was issued a summons for disorderly conduct (for) creating a hazardous condition. The entry also states that a Stop and Frisk Report was prepared.

PO Reyes was interviewed on March 18, 2009 (encl. 11). He stated that they saw § 87(2)(b) quickly walking toward them on East Gun Hill Road near Tilden Street in the direction of White Plains Road (in front of a funeral home) with his hands in his jacket pockets and nervously looking down. This area was well lit by streetlights. § 87(2)(b) wore a dark-colored down jacket. Both of § 87(2)(b)s hands were in his pockets. He was walking fast, and maintained this same pace until his eventual stop. As § 87(2)(b) came closer to them, PO Reyes spotted a suspicious bulge in his right jacket pocket (which he later found out was § 87(2)(b)s hand in a cast). He told his partners that he saw it, and his partners confirmed that they also saw it. PO Reyes believed that the bulge was gun shaped. However, when asked if he could discern anything that looked like a handle or a barrel, he said no. PO Cole, who was still in front of § 87(2)(b) and about eight feet away, said, “Excuse me, sir,” but § 87(2)(b) walked past them without responding. All three officers then said, “Hey you, sir!” At that point, § 87(2)(b) looked at them and replied, “Fuck you guys, I’m not stopping. Why the fuck are you stopping me? I’m not doing anything!”

They told him to stop and take his hands out of his pockets, but he repeated, “What the fuck are you stopping me for?” § 87(2)(b) then spun around to face PO Reyes and his partners and asked, “What the fuck? What are you stopping me for?” As he turned around, he yanked his hands out of his pockets and moved his right hand up toward his shoulder after he pulled it out; PO Reyes did not observe § 87(2)(b)s

left hand because he was focused on the right hand which had been where the bulge was located. PO Reyes observed that his right hand, which PO Reyes said had created the bulge, was wrapped in a cast. When asked whether he had suspected § 87(2)(b) of committing a crime at this point in time, PO Reyes said that he did not, but he suspected that § 87(2)(b) might be armed with a weapon. PO Reyes acknowledged that he had told § 87(2)(b) to stop because his bulge, in combination with his pace of walking, indicated that he could have committed a crime. Fearing for their safety, POs Reyes, Cole and Deck put their hands on their guns. § 87(2)(b) asked, “What the fuck? Are you guys going to shoot me or something?”

§ 87(2)(b) did not initially comply when he was ordered to stand against the wall and yelled, “I don’t know what you’re stopping me for! Don’t touch me!” while moving his hands up and down in front of his torso. He also moved a hand in a swatting gesture towards PO Cole, though PO Reyes was not entirely sure that this happened. However, § 87(2)(b) complied about thirty seconds later and PO Reyes frisked the pockets of his jacket, where he thought the bulge had been, as well as his waistband. He did not feel anything suspicious. The undersigned noted that the bulge was no longer present at the point of the frisk and that PO Reyes had earlier said in his interview that he determined that § 87(2)(b)’s hand had created the bulge when he removed it. When asked why he frisked § 87(2)(b) if he already knew what the bulge was, PO Reyes said that he was not sure whether § 87(2)(b) had been trying to yank something else out of his pocket, so he frisked § 87(2)(b) for his safety. He acknowledged that he did not observe any more bulges after § 87(2)(b) removed his hand from his pocket. PO Reyes did not recall reaching into § 87(2)(b)’s jacket pockets, though he may have done this if § 87(2)(b) had possessed a cell phone or other hard object. He did not, however, reach into § 87(2)(b)’s pants pockets. When asked if he still saw the bulge after he pulled his hand out, he replied, “I didn’t look for a bulge at that point.” PO Reyes denied telling § 87(2)(b) that he could be arrested and denied striking § 87(2)(b).

PO Reyes obtained § 87(2)(b)’s identification. He stated that he issued him a summons for disorderly conduct because he was “causing an offensive condition to myself and the public by yanking his hand out, yelling, screaming.” PO Reyes did not notice anyone watching what was happening during the stop, though from his peripheral vision he thought he observed perhaps three or four persons walking by about ten feet away at various points during the stop of § 87(2)(b). PO Reyes then said that § 87(2)(b) caused public alarm because he was yelling and cursing as he walked away toward the Gun Hill Road train station as people were leaving the station. However, PO Reyes conceded that § 87(2)(b) had already been issued the summons at that point.

#### **Police Officer Elvis Cole**

*PO Elvis Cole is a § 87(2)(b)-old white male who stands 5’10” tall and weighs approximately 220 lbs. He was interviewed at the CCRB on March 13, 2009 (encl.15). PO Cole did not have any entries in his memo book regarding this incident (encl. 14).*

PO Cole’s statement was consistent with PO Reyes with the following exceptions and additional details. PO Cole provided a more comprehensive description of § 87(2)(b)’s clothing, noting that he was wearing a dark stocking wool cap, blue jeans and a light-colored puffy jacket that went below his waist. He also explicitly estimated that § 87(2)(b) was at least fifteen feet away from the officers when PO Cole first observed him, and that § 87(2)(b) appeared to be nervous and was making a lot of motions to his waist. PO Cole physically demonstrated that § 87(2)(b)’s hands were in his pockets and were moving around. His right hand was moving more than his left and it appeared that he was trying to grab something in his waistband. After § 87(2)(b) turned around and removed his hands from his pockets, PO Cole grabbed his gun and unclipped his holster because he suspected that § 87(2)(b) had a weapon. He denied removing his gun from the holster and stated that POs Deck and Reyes did not draw their guns either. Prior to the point at which PO Reyes issued the summons, the officers did not have any discussion about whether or not a disorderly conduct summons should be issued.

#### **Police Officer Joseph Deck**

*PO Deck is a § 87(2)(b)-old white male who stands 5’8” tall and weighs approximately 180 lbs. He was interviewed at the CCRB on March 18, 2009 (encl. 13). He did not prepare a memo book entry for this incident (encl. 12).*

PO Deck provided a statement that was similar to that of PO Cole and PO Reyes with a few exceptions and additional details, which are noted below. He noted that when § 87(2)(b) tried to remove his right hand from his pocket, it looked like he was attempting to pull something out, so POs Deck, Cole and Reyes put their hands on their guns, though no one drew his gun. PO Deck affirmed that PO Reyes frisked § 87(2)(b)'s jacket pockets and lifted the jacket up to look at his belt area. He was not sure if PO Reyes frisked his pants pockets, but PO Reyes did not conduct a full body frisk. When asked if he still saw the bulge in § 87(2)(b)'s jacket pocket after he pulled his hand out, PO Deck replied that the same bulge was still there from § 87(2)(b)'s hand having been in the pocket. § 87(2)(b) was not physically aggressive toward them, but he was cursing and throwing his hands up as he spoke. He continued to curse during the frisk, noting that the officers' actions were "bullshit." PO Deck also stated that at least two people stopped to watch what was happening when § 87(2)(b) was yelling and cursing at them.

### **Police Documents**

According to *tour 3 roll call* on February 18, 2009, POs Cole, Deck and Reyes were assigned to footposts (encl. 17).

The 47<sup>th</sup> *Precinct Stop and Frisk Logs* for February 18, 2009 and February 19, 2009 do not show that a Stop and Frisk Report was prepared regarding anyone named § 87(2)(b) (encl. 16).

§ 87(2)(b)

§ 87(2)(b)

### **CCRB History**

§ 87(2)(b)

§ 87(2)(b), § 87(2)(b), PO Cole, PO Deck and PO Reyes all have one year of tenure with the NYPD and neither has had a substantiated allegation (encl. 2-4).

## **Conclusions and Recommendations**

### **Officer Identification**

§ 87(2)(b) identified all three subject officers by name from their badges. He provided detailed physical descriptions and was interviewed within twelve hours of the time of occurrence. When interviewed the officers acknowledged their presence and roles during the incident. They were equally culpable for the decision to stop § 87(2)(b) so a stop allegation is pleaded against each officer. § 87(2)(b) allegedly observed PO Cole draw his gun, and therefore a gun drawn allegation is pleaded against PO Cole. The only issue with officer identification concerned the officer that frisked, searched and hit § 87(2)(b). § 87(2)(b) attributed these actions to PO Cole, but each officer identified PO Reyes as the one who frisked § 87(2)(b). As § 87(2)(b) was facing the wall with his back to the officers he could not see who frisked him, and the officers had no ostensible incentive to lie about which one frisked § 87(2)(b). The investigation determined that PO Reyes frisked § 87(2)(b) and allegedly searched him. Therefore, the force allegation is also pleaded against PO Reyes.

### **Undisputed facts**

It is undisputed that § 87(2)(b) walked on East Gun Hill Road towards White Plains Road with his hands in his pockets. POs Reyes, Deck and Cole were walking in the opposite direction of § 87(2)(b) and, before they passed each other, at least one officer said some words similar to "Yo," or "Excuse me, sir." § 87(2)(b) said something back to the officers and passed them. The officers then asked him to stop and § 87(2)(b) uttered the word "fuck" at least one time. He turned around and jerked his right hand, which was in a cast, out of his pocket. PO Reyes subsequently frisked him and issued him a summons for disorderly conduct.

§ 87(2)(b), § 87(2)(g)

[REDACTED]

§ 87(2)(b), § 87(2)(g)

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

§ 87(2)(b), § 87(2)(g)

**Allegation A: PO Victor Reyes stopped** § 87(2)(b)

**Allegation B: PO Elvis Cole stopped** § 87(2)(b)

**Allegation C: PO Joseph Deck stopped** § 87(2)(b)

As established above, the officers verbally instructed § 87(2)(b) to stop and took equal responsibility for the decision to stop him. § 87(2)(b), § 87(2)(g)

Barry Kamins's New York Search and Seizure notes that a stop has effectively occurred when "an individual is actually or constructively detained by virtue of a significant interruption of his liberty of movement" (encl. 1). Kamins notes a number of prior cases in which an officer's instructions for a complainant to turn around or place one's hands on a secure object constituted this interruption of movement. § 87(2)(g)

Kamins further cites the New York Court of Appeals *People v. Debour* in noting that an officer can forcibly stop a person when the officer possesses "reasonable suspicion that the person has committed, is committing or is about to commit a felony or misdemeanor" (encl. 1). This language was later codified under Criminal Procedural Law §140.50(1). The officers stated that their decision to stop § 87(2)(b) was based on the bulge in his pocket, his jerking hand motion and his cursing at them. PO Reyes added that § 87(2)(b)'s brisk pace contributed to raising his suspicion. § 87(2)(b), § 87(2)(g)

**Allegation D: PO Elvis Cole drew his gun.**

**Allegation E: PO Victor Reyes threatened to arrest** § 87(2)(b)

As established above, the investigation could not conclude whether PO Cole drew his gun or PO Reyes informed § 87(2)(b) that he could be arrested for suddenly jerking his right hand out of his pocket. It is § 87(2)(g)

**Allegation F: PO Victor Reyes frisked** § 87(2)(b)

§ 87(2)(b), § 87(2)(g)

PO Reyes justified the frisk of the pocket based on the bulge in § 87(2)(b)'s pocket and § 87(2)(b)'s abrupt jerking motion when he removed his hand from the pocket. He stated that these actions led him to believe that § 87(2)(b) was in possession of a weapon, and he also added that § 87(2)(b)'s hand, while it was in his pocket, was fidgeting towards his waistline.

§ 87(2)(b), § 87(2)(g)

Kamins notes that, in order to conduct a lawful frisk, an officer must possess reasonable suspicion that a subject has committed a crime *as well as* reasonable suspicion that the subject is in possession of a weapon. § 87(2)(b), § 87(2)(g)

[REDACTED]

**Allegation G: PO Victor Reyes searched § 87(2)(b)**

**Allegation H: PO Victor Reyes used physical force against § 87(2)(b)**

§ 87(2)(b), § 87(2)(g)

Investigator:

Date:

Supervisor:

Date:

Reviewed by:

Date:

Reviewed by:

Date: